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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1757

FEDERAL ELECTRIC CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Claims (Pet. App. A, 1a–14a) is reported at 202 Ct. Cl. 1028, 486 F. 2d 1377. The opinion of the Armed Services Board of Contract Appeals (Pet. App. C, 16a–38a) is reported at 68–1 BCA Para. 6834.

JURISDICTION

The decision of the Court of Claims was entered on October 25, 1973, and a timely motion for rehearing was denied on January 23, 1974 (Pet. App. B, 15a). By order of April 18, 1974, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including May 23, 1974, and the peti-

tion was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether the procurement contract in this case, requiring a set minimum purchase by the government and giving it the right to make additional purchases up to a designated maximum amount within a specified time, was unenforceable by the government as to the additional purchases.

2. Whether the contract prohibited the government from ordering generators from petitioner, within the maximum purchase limit, because they were ordered to replace generators another contractor had failed to deliver.

STATEMENT

This suit under the Wunderlich Act, 41 U.S.C. 321–322, arose out of a contract between the United States and petitioner, Federal Electric Corporation ("FEC"), for the production and delivery of mobile generators. The contract, which was awarded FEC after competitive negotiations, required government purchase of 453 units at prices set in the contract and obligated FEC to supply a maximum of 3600 units at set prices on government orders issued within one year. Petitioner deliberately bid at a marginal profit to secure the contract to provide volume for a new plant (Pet. App. C, 17a–18a). After the government timely issued two delivery orders, totaling 459 units (Pet. App. C, 20a), petitioner claimed to have discovered that its contract bid contained pricing errors that would cause it a loss but gave assurances that it

was "making an all-out effort to meet our commitments" (Pet. App. C, 21a). Approximately one month later, petitioner asserted that because of lack of consideration for its undertaking to supply more than the minimum quantity set forth in the contract, the contract was unenforceable beyond the 453 minimum order quantity, that its promise to furnish up to 3600 units at contract schedule prices was merely a revocable offer, and that it was withdrawing its offer to deliver units above the 453 minimum order at contract prices (Pet. App. C, 21a–22a). Petitioner subsequently objected to delivery orders on the additional ground that the government would use the generators ordered to supply its needs resulting from the default of Bogue Electric Company ("Bogue") under a contract for similar generators (Pet. App. C, 23a–25a).

Despite these objections, petitioner continued to manufacture and deliver under protest the 2,174 generators subsequently ordered by the government under the contract, including 763 units to satisfy procurement requirements resulting from the default and termination of Bogue's contract. After the contracting officer rejected petitioner's claim that the contract was unenforceable above the minimum quantity (Pet. App. C, 22a–23a), petitioner appealed to the Armed Services Board of Contract Appeals (the "Board").

In a comprehensive opinion, the Board unanimously rejected petitioner's claim that the contract as a whole, or for procurements above the minimum quantity, was void for lack of consideration. The Board held that the government's obligation to order 453 units from petitioner for a purchase price of almost

$2.9 million is "sufficient consideration in law and hence an obligation and promise providing consideration for [petitioner's] counterobligation or promise, to deliver * * * units up to 3,600 at the agreed upon prices" (Pet. App. C, 28a–29a). Moreover, the Board stated that "In the light of the evidence which we have examined, we are compelled to find that [petitioner] did not intend" that the contract should be considered "as a revocable option contract" and did not advise the government of any such intent (Pet. App. C, 32a). The Board also unanimously ruled that there was nothing in the contract which prohibited the government from ordering units to replace units not furnished by another contractor; "[o]n the contrary, one would assume that the contract, with its flexibility as to the number of generator sets to be delivered thereunder, provided a suitable and ready means for reordering those quantities of generator sets which other contractors had failed to deliver" (Pet. App. C, 35a).

Petitioner then instituted this action in the Court of Claims for review of the Board's decision. The court unanimously rejected petitioner's contention that the contract was unenforceable and also rejected, over a single dissent, petitioner's contention that the Bogue reprocurement was improper. With respect to the first issue, however, the court did not reach the Board's holding that the contract itself was valid and enforceable *ab initio*,[1] but accepted instead the alter-

[1] However, in his concurring opinion, Judge Nichols expressed his view that the Board's reasoning on the issue of enforceability should be adopted *in toto* because he found it "simple, sound, and convincing" (Pet. App. A, 13a).

native ground that even if the contract had been unenforceable *ab initio,* petitioner's claim for increased prices must fail because an unenforceable contract becomes enforceable to the extent that it is performed (Pet. App. A, 6a–10a). In so ruling, the court relied upon *Willard, Sutherland & Co.* v. *United States,* 262 U.S. 489, which holds that a contested indefinite quantity procurement contract becomes enforceable, despite protest, to the extent that it is performed. The court distinguished its earlier decision in *Northern Helex Co.* v. *United States,* 197 Ct. Cl. 118, 455 F. 2d 546, which had accepted "the contemporary view of performance under protest as restated in section 1–207 of the Uniform Commercial Code" ("UCC")[2] (Pet. App. A, 7a–9a). With respect to the second issue, the validity of the order for generators required as a result of Bogue's default, the Court of Claims, agreeing with the Board, held that the 763 additional units "were merely additional orders" under the contract with petitioner under which "the Government was free to order up to 3,600 generators within one year, regardless of the reason why said generators were needed. * * * The fact that these were reprocurement orders is relevant only to the Government's duty to mitigate damages to the defaulted contractor. In an effort to accomplish this goal, the contracting officer is not limited to specific methods of reprocurement, but rather is given broad discretion" (Pet. App. A, 11a–

[2] Section 1–207 provides:

"A party who with explicit reservation of rights performs or promises performance or assents to performance in a manner demanded or offered by the other party does not thereby prejudice the rights reserved. * * *"

12a). Petitioner then petitioned for rehearing and argued for the first time that Section 1–207 of the UCC was applicable to this contract and required a contrary result on the first issue. The Court of Claims denied the petition for rehearing on January 23, 1974 (Pet. App. B, 15a).

ARGUMENT

Petitioner argues that this Court should grant its petition for a writ of certiorari to resolve a "conflict between the Court of Claims and the Second Circuit regarding the applicability of the UCC to disputes under Government contracts * * *" (Pet. 10).[3] But there is no such conflict.

The question of the applicability of the UCC presented by this case is not the broad one posed by petitioner but, as we show within, a much narrower one: whether, under the facts of this case, the Court of Claims was justified in following this Court's decision in *Willard, Sutherland & Co.*, supra, which held that a contractor who completely performs a disputed contract may not subsequently challenge the contract's basic enforceability, or whether the Court of Claims should have followed Section 1–207 of the UCC providing that performance under specific protest does not prejudice the rights reserved. As we also show, there is no conflict among the circuits on either issue. Finally, certiorari is not appropriate since the Court

[3] Petitioner's failure to raise this issue regarding the applicability of the UCC in the administrative proceedings generally precludes consideration of this issue by reviewing courts. *Ace Construction Co.* v. *United States*, 185 Ct. Cl. 487, 500, 401 F. 2d 816, 823. Thus, neither the Court of Claims nor this Court is required to reach this issue in reviewing the Board's decision.

of Claims' decision is correct on the independent ground that the contract here was plainly enforceable, as found by the Board. Thus, any contrast between the waiver theory of *Willard,* applied by the Court of Claims, and the non-waiver theory of UCC 1–207, is not truly at issue.

1. The principal argument in FEC's petition is that review by this Court is necessary to relieve "uncertainty and confusion" in the lower courts regarding the applicability of the UCC to disputes arising under government contracts (Pet. 8–11). Yet, as petitioner has conceded, the courts of appeals which have considered the applicability of the UCC (Pet. 14–15), as well as the Court of Claims (Pet. 15–16), have expressly acknowledged the growing authority and impact of the UCC on the federal common law of contracts.[4] In fact, the Court of Claims is a principal proponent of the UCC in federal contracting and, as petitioner notes, has frequently applied the UCC (Pet. 15). Moreover, petitioner admits that the Court of Claims previously applied the very section at issue here, 1–207, in *Northern Helex Co.* v. *United States,* 197 Ct. Cl. 118, 455 F. 2d 546. Thus the real issue presented by this case is not whether the UCC is an important source of federal law, nor even whether Section 1–207 can be applied to government contracts; both of these questions have already been answered affirmatively by the Court of Claims. Petitioner's actual quarrel with the Court of Claims' decision is whether "[t]he *very same* UCC provision which was at issue in *Northern*

[4] Congress has not adopted the UCC as a rule of decision in federal procurement contracts.

Helex * * * was distinguished, erroneously, by the Court of Claims" (Pet. 16, emphasis in original). The Court of Claims' decision on this narrow question is correct and does not merit review by this Court.

The UCC cannot be applied mechanically to federal procurement because of the extensive coverage of government procurement regulations and the fact that the UCC was written for private not public transactions.[5] Thus, in the absence of legislation correlating provisions of the UCC and existing federal regulations, the courts must necessarily exercise some discretion in its application.

In *Northern Helex, supra*, where the government had unilaterally refused to pay for helium delivered under its contract and it was practically impossible to stop producing the helium without simply wasting it or to deliver it to anyone else, the Court of Claims, referring to these special circumstances, found the rule of UCC 1–207 applicable and held that delivery under protest did not preclude the supplier's right to sue for the purchase price under the contract. 455 F.

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[5] A commentator relied upon by petitioner has expressly recognized the problem in applying the UCC to federal contracting:

"Basically, government contract law and the legal principles contained in the Code represent two different types of legal machinery. The Code is built around layman's arrangements. On the other hand the government contract is not only a formal document calling for the furnishing of supplies and services, but also a vehicle for the implementation of public or administrative policies. A consequence of this dichotomy is that implementation of the Code in government-procurement cases may tend to be an unsettling influence in a multi-faceted and dynamic field of law." (Gusman, *Article 2 of the U.C.C. and Government Procurement: Selected Areas of Discussion*, 9 Boston College Ind. & Com. L. Rev. 1, 18 (1967), footnote omitted.)

2d at 552. Here, however, unlike *Northern Helex*, there was no breach of a contract by the government; FEC was not a supplier reacting to the government's deliberate breach but a contractor attempting to shift the cost of unilateral bidding errors or a deliberate underbid to the federal government. Had these alleged errors been remedied prior to submission of FEC's bid, there is no guarantee that the contract would have been awarded to FEC at all.[6] Moreover, FEC cannot even candidly assert that it was relying upon the UCC rule when it chose to perform the contract in 1966, as the record shows that the provisions of 1–207 were not even cited by FEC until raised by the Court of Claims,[7] and further shows that petitioner's perform-

[6] The Board noted that the cost analysis in FEC's bid showed a possible loss or minimal profit on the contract, and that the government accepted the bid only after receiving FEC's assurance that the bid was deliberately low to provide a volume needed by the FEC plant (Pet. App. C, 17a). FEC later claimed that it had made errors in figuring its bid, which would give a larger loss than anticipated, and sought additional compensation (*id.* at 20a–23a).

[7] Although there do not appear to be any decisions squarely on this point, it is also doubtful that Section 1–207 was intended to reach the situation presented here. As the comments indicate, the section was probably intended to allow a party to continue or to accept performance without waiver of rights under a concededly valid contract despite a disagreement regarding the interpretation of its terms. Thus, the section only preserves to the protesting party all its rights *under the contract's terms* and cannot serve as a basis for recovery beyond what could be recovered for breach:

"The section is not addressed to the creation or loss of remedies in the ordinary course of performance but rather to a method of procedure where one party is claiming as of right something which the other feels to be unwarranted." (ALI, Uniform Commercial Code (1957 Official Text with Comments), Sec. 1–207, Comment 2.)

ance was in furtherance of its own business interests (Pet. App. C, 17a, 30a–31a). Thus the instant case, an attempt to increase compensation under a contract while performing it, is fundamentally unlike the *Northern Helex* case.

2. Petitioner argues that *Willard, Sutherland & Co.* v. *United States, supra,* 262 U.S. 489, relied upon by the Court of Claims, is inapplicable to its contract because the contract's disputes clause compelled petitioner's performance (Pet. 17, 20–22). As the Court of Claims correctly recognized (Pet. App. A, 8a–9a), this is antithetical to petitioner's position that no enforceable contract existed. Moreover, petitioner's contract incorporated by reference only ASPR 7.103–12 (a)[8] which relates solely to "any dispute concerning a *question of fact arising under this contract* * * *" and therefore is inapplicable to petitioner's purely legal assertions that no contract ever existed. Cf. ASPR 7–103.12(b) (Pet. App. D, 39a). This Court has recognized that only claims arising under *clauses of the contract* requiring equitable adjustment are within the disputes clause, *Crown Coat Front Co.* v. *United States,* 386 U.S. 503, 506, n. 2, and that the disputes clause does not cover all disputes relating to the contract, *United States* v. *Utah Construction Co.,* 384 U.S. 394, 418. Since petitioner's claim is not within the scope of the disputes clause, the existence of such a clause manifestly does not distinguish this case from *Willard, supra.*

[8] Pet. App. D, 39a, emphasis added. The provisions of ASPR incorporated into this contract are set out in General Provisions—Fixed Supply Contracts, p. 2, no. 20. ASBCA No. 11726, Tab. A.

For disputes which are subject to the disputes clause, perhaps the vast majority of disputes, the Court of Claims has indeed recognized the inapplicability of the *Willard* rationale, recognizing that continued performance is required. See *Dynamics Corp. of America* v. *United States*, 182 Ct. Cl. 62, 389 F. 2d 424 (Pet. App. A, 8a–9a). This minimizes the difference between *Willard* and UCC 1–207 but does not eliminate the *Willard* waiver rule. Nor should it be eliminated. While the UCC rule serves the policy of encouraging performance during disputes, an additional policy must also be considered in federal procurement. A contractor should not be permitted to bid low to obtain a public contract and then litigate without risk to receive higher compensation. The limited disputes clause of government contracts, together with the *Willard* rule, serves to reconcile these two policies.[9]

3. Contrary to petitioner's assertion, the Court of Claims was not in error in rejecting petitioner's objec-

[9] Petitioner has also asserted that Department of Commerce directives as to this contract requiring performance (as a defence contract) distinguish this case from *Willard* (Pet. 17). This argument is without merit because the directives are not shown in the administrative record. Cf. *United States* v. *Carlo Bianchi & Co., Inc.*, 373 U.S. 709. Moreover, the departmental regulations permitting such directives also provide petitioner with an opportunity to protest them if they work a hardship. 32A C.F.R. BDSA Reg. 2, § 23 (1966 rev.). Petitioner failed to utilize this administrative grievance procedure and therefore cannot now be heard to object to the effect of such directives as may have been issued.

Petitioner is also inaccurate in asserting that the Government has admitted no contract existed (Pet. 21–22). As the Court of Claims recognized, the Government's position was that a binding contract existed, or, *in the alternative*, if the contract was unenforceable as drafted, it was enforceable to the extent performed (Pet. App. A, 7a).

tion to the two orders for generators necessitated by the Bogue default. Both tribunals below correctly recognized that petitioner was obligated to supply up to 3600 generators, and the cause for the government's orders was of no consequence to petitioner so long as the orders did not exceed 3600 units.[10] To accept petitioner's argument would deprive the government of needed flexibility in scheduling procurements, a flexibility it bargained for in the terms of the contract. See *Astro-Space Laboratories, Inc.* v. *United States,* 200 Ct. Cl. 282, 470 F. 2d 1003.

4. Even if the Court should disagree with the applicability of the *Willard* rule by the Court of Claims in this case, the substantive decision of the Board and the Court of Claims remains correct: the contract was enforceable and binding. Under the terms of the agreement, the government promised to order and did order 453 generators at contract prices.[11] In return, FEC promised to fill government orders for a period of one year not to exceed a total of 3600 generators. As the Board properly held, the government's promise to buy and its purchase of the 453 units for a total price of nearly $3 million

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[10] The Government ordered and received 2633 generators or 73% of the contractual maximum.

[11] Pet. App. C, 20a. The Board expressly found in accordance with its prior holdings that the minimum order quantity was "'not optional' with but obligatory upon [the government]" (Pet. App. C, 27a).

Petitioner has also asserted that the standard termination clause (Pet. App. D, 40a–48a) relieved the government of the obligation to order even the minimum requirement (Pet. 4). This interpretation of the clause was expressly rejected by the Board (Pet. App. C, 33a).

constituted sufficient consideration to support FEC's return promise to supply additional units to a stated maximum figure for stated prices (Pet. App. C, 27a–32a). The Board's decision is correct,[12] and this ground is fully dispositive of petitioner's suit.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1974.

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[12] In addition to the authorities cited in the opinion, see Opinion of the Comptroller General, *U.S. Compressed Gas Company*, No. B–160063, February 10, 1967, and 1A Corbin, *On Contracts*, § 157, p. 46 (1963 ed.) (emphasis added):

"A promise to supply on stated terms all the goods or services that the promisee may thereafter order is not itself an illusory promise. Instead, it is a very definite promise that creates a large power in the promisee. *It is an enforceable promise if the promisee gives any sufficient consideration for it.* The consideration may be anything that the promisor bargains for and that is given in exchange for it."

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